



## **Restoring Habeas Corpus: An Analysis of *Boumediene v. Bush***

Striking a huge blow to the Bush administration's aggrandizement of executive power, the Supreme Court has issued a 5-4 decision restoring the full scope of the ancient writ of *habeas corpus* and reasserting our country's commitment to its core constitutional principals. Writing for the majority, Justice Kennedy, joined by Justices Stevens, Souter, Ginsburg, and Breyer, struck down the provisions of the Military Commissions Act and the Detainee Treatment Act that purported to strip federal courts of jurisdiction over *habeas* petitions by non-citizens who have been labeled "enemy combatants" by the executive branch. Citing centuries of legal precedent, beginning with the Magna Carta, the majority rejected the Bush administration's attempt to create a legal black hole at the U.S. Naval Station in Guantanamo Bay, Cuba. The Court held that the President may not circumvent the Constitution's requirement that the detainees be given a fair hearing before an impartial judge, and in doing so have paved the way for people who have been held for six years without charge to finally get their day in court.

### **A Historic Right**

Four years ago, in *Rasul v. Bush*, 542 U.S. 466 (2004), the Supreme Court held, contrary to the assertions of the Bush administration, that Guantanamo detainees were entitled to a hearing before a federal court to challenge their indefinite detention. Rather than explicitly relying on the constitutional right to a *habeas* hearing in the case, the Court found that the federal *habeas* statute applied to those held at Guantanamo. At the urging of President Bush, Congress responded to the *Rasul* decision by passing the Detainee Treatment Act of 2005 (DTA), which repealed the *habeas* statute for Guantanamo detainees and stripped federal courts of jurisdiction to hear their *habeas* claims. In 2006, Congress amended the DTA in the Military Commissions Act of 2006 (MCA), which stripped *habeas* rights from any non-citizen who the executive branch labels an "enemy combatant," whether or not they are being held at Guantanamo. Detainees, many of whom have now been imprisoned for over six years without a fair hearing, challenged the constitutionality of the *habeas*-stripping provisions, and once again, the cases made their way to the Supreme Court, resulting in yesterday's decision in *Boumediene v. Bush*.

Echoing the reasoning of the *Rasul* decision, Justice Kennedy's majority opinion in *Boumediene* rejects the Bush administration's formalistic arguments and finds that, since the United States exercises full control over Guantanamo Bay, the Constitution's *habeas* guarantee applies to those detained at the base. Based on the history of the writ of *habeas corpus*, the text of the Constitution, and structural concerns about separation of powers, the Court rebuffs President Bush's contention that he can create a lawless zone of indefinite executive detention, free from oversight and unchecked by the judiciary, saying

“Our basic charter cannot be contracted away like this.” To find otherwise, the majority says, would be to “hold the political branches have the power to switch the Constitution on or off at will.” Speaking for the court, Justice Kennedy notes, “The Government presents no credible arguments that the military mission at Guantanamo would be compromised if habeas corpus courts had jurisdiction to hear the detainees’ claims. And in light of the plenary control the United States asserts over the base, none are apparent to us.”

### **An Inadequate Substitute**

After determining that the constitutional right to *habeas* applies even at Guantanamo, the Court finds that the alternative procedures created by the Bush administration, called Combatant Status Review Tribunals (CSRTs), are not an adequate substitute for the constitutional right to *habeas corpus*. The Bush administration had argued that even if the detainees at Guantanamo did have a right to a fair hearing before an impartial judge, the CSRT process satisfied that constitutional requirement. But the majority rejected that assertion, saying, “For the writ of habeas corpus, or its substitute, to function as an effective and proper remedy in this context, the court that conducts the habeas proceeding must have the means to correct errors that occurred during the CSRT proceedings.” The CSRT is not an adversarial process, the Court observes, given that a detainee does not have a lawyer, is not allowed to confront witnesses, and is not shown much of the evidence against him. The CSRT appeals process created by the DTA does not allow a detainee to produce new evidence of his innocence, challenge the legal authority behind his detention, or contest the facts as found by the CSRT panel, and it does not give the appeals court authority to order a detainee’s release. The majority observes, “[E]ven when all the parties involved in this process act with diligence and in good faith, there is considerable risk of error in the tribunal’s findings of fact. This is a risk inherent in any process that, in the words of the former Chief Judge of the Court of Appeals, is ‘closed and accusatorial.’ ... And given that the consequence of error may be detention of persons for the duration of hostilities that may last a generation or more, this risk is too significant to ignore.”

### **A Clear Mandate**

The Court’s decision leaves little room for *habeas* opponents to try and circumvent the ruling, explicitly ordering that the detainees receive “prompt habeas corpus hearings.” The majority rejected calls for further delay, noting, “In some of these cases six years have elapsed without the judicial oversight that habeas corpus or an adequate substitute demands. And there has been no showing that the Executive faces such onerous burdens that it cannot respond to habeas corpus actions. ... [T]he costs of delay can no longer be borne by those who are held in custody.” The Court left many procedural questions to the “expertise and competence of the District Court to address in the first instance,” including the “extent of the showing required by the Government in these cases.” However, Justice Kennedy’s opinion makes clear that the *habeas* hearings should be rigorous, saying, “Where a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing.”

Despite the decision's clarity, President Bush and his allies in Congress have already threatened to try and undercut it with legislation. Senator Lindsey Graham (R-SC) even suggested that he will consider drafting a constitutional amendment "to blunt the effect of this decision," demonstrating just how little room the Court's decision left for further Congressional interference.

### **A Vitriolic Dissent**

In contrast to the majority's adherence to the history and text of the Constitution and the values that animate the American legal system, the four dissenting Justices unsurprisingly clung to Bush administration talking points and grand theories of unilateral executive power. Chief Justice Roberts, joined by Justices Scalia, Thomas, and Alito, complained of judicial activism, saying, "All that today's opinion has done is shift responsibility for those sensitive foreign policy and national security decisions from the elected branches to the Federal Judiciary." The Chief Justice accuses the majority of "misread[ing] the statute" and creating a "new method of constitutional adjudication." He worries that the American people will "lose control over the conduct of the Nation's foreign policy to unelected, politically unaccountable judges."

Justice Scalia issued his own dissent, joined by the Chief Justice and Justices Thomas and Alito, charging the majority with "manipulation" of the writ of *habeas corpus* sparked by an "inflated notion of judicial supremacy." Even more explicitly than Chief Justice Roberts, Justice Scalia blames the majority for endangering the country. Using familiar right-wing buzz words, he bemoans, "The game of bait-and-switch that today's opinion plays upon the Nation's Commander in Chief will make the war harder on us....It will cause more Americans to be killed."

### **A Delicate Balance**

In restoring the ancient writ of *habeas corpus* and reasserting our country's commitment to the rule of law, the majority has refused to sacrifice judicial review to the passions of the day. In a paean to our Constitutional values, and in response to the harsh criticism lodged by the dissenters, Justice Kennedy writes:

"Security subsists, too, in fidelity to freedom's first principles. Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers....Our opinion does not undermine the Executive's powers as Commander in Chief. On the contrary, the exercise of those powers is vindicated, not eroded, when confirmed by the Judicial Branch...."

The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The Framers decided that

habeas corpus, a right of first importance, must be a part of that framework, a part of that law.”

For the fourth time in as many years, the Supreme Court has stood up for the rule of law, bucking the Bush administration’s executive power-grabs despite alarmist accusations about the exigencies of the War on Terror. But the Court’s makeup has shifted over that time period, with confirmation of two Bush-appointed Justices leaving the constitutional right to *habeas corpus* hanging by a thread. The replacement of a single Justice could turn the dissenters into the majority and transform their ultraconservative views into the law of the land. With its decision in *Boumediene*, the Supreme Court has provided yet another illustration of the importance of a vigorous judicial selection process and the power of the President to mold the federal judiciary with his or her nominations.